

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**
www.flmb.uscourts.gov

In re:

THE BAY CLUB OF NAPLES, LLC,

Debtor(s).

Chapter 11

Case No. 9:20-bk-05008-FMD

(Jointly Administered)

**ACRES CAPITAL, LLC'S MOTION TO DISMISS BANKRUPTCY CASE
FOR LACK OF AUTHORITY TO FILE PETITION, BASED UPON ABSTENTION, OR
AS A BAD FAITH FILING PURSUANT TO 11 U.S.C. § 1112(B)**

ACRES CAPITAL, LLC, a New York limited liability company, as Administrative Agent (herein "ACRES") for the debtors' pre-petition construction lenders, by and through its undersigned counsel, moves the Court (the "Motion") for the entry of an order dismissing these chapter 11 bankruptcy cases for lack of authority to file the petitions. Alternatively, ACRES requests the Court dismiss based upon abstention under 11 U.S.C. § 305, or, dismissal based upon bad faith under 11 U.S.C. § 1112.

Summary

This is the third bankruptcy involving the Bay Club entities. As the Court is aware, the first cases were commenced involuntary bankruptcy proceedings. This Court dismissed those involuntary cases. The second set of "voluntary" proceedings were commenced by Mr. Zea on the eve of trial of the involuntary cases. ACRES moved to dismiss the second cases. Faced with ACRES' motion to dismiss, Mr. Zea sought the voluntary dismissal of the "voluntary" cases so that he could go back to state court and clarify his authority to act for the Debtors. This Court agreed with Mr. Zea and dismissed the voluntary cases, too, so that the state court could resolve questions about Mr. Zea's authority to act for the Debtors. In the orders dismissing the prior

“voluntary” cases, the court made clear that questions about the Debtors’ authority to commence a bankruptcy under the facts presented is specifically reserved for the state court presiding over the foreclosure litigation. Those dismissal orders are final orders of the Court. Thereafter, Mr. Zea’s filed pleadings in the state court attempting to undo prior state court agreed orders ceding authority over the Debtors.

So here we are six months later and Mr. Zea has again commenced voluntary chapter 11 cases on behalf of the Debtors. One might surmise, based upon the history of the matter, that the state court presiding over the foreclosure litigation agreed with Mr. Zea and granted him the authority to proceed with initiating these cases. The opposite is true. The state court rejected Mr. Zea’s attempt to undue the settlement agreement, the settlement order, and the receiver order. That should have ended the matter with both sides receiving the benefit of the bargain the struck over a year ago.

Not so, it seems. This second voluntary filing by Mr. Zea is based upon a purported agreement dated June 26, 2020 that must violate (we can be no more definitive because the parties have failed and refused to provide a copy to ACRES) the settlement agreement, settlement order, and receiver order. Regardless, this purported settlement agreement was not approved by the state court presiding over the foreclosure case and has been concealed from ACRES. As a result, and for the same reasons the Court dismissed the first voluntary cases, at Mr. Zea’s request, the Court must dismiss these cases again. Moreover, given the totality of facts, these cases should be dismissed for bad faith.

Background

Summary of Relevant History and Prior Rulings of this Court¹

1. The underlying disputes arise out of a \$28.5 million construction loan made by ACRES to the Debtors in the Summer of 2016.

2. The Debtors defaulted on the construction loan for, among other reasons, failing to pay ACRES all sums due and owing at maturity.

3. As a result, on November 20, 2018, ACRES commenced a foreclosure case against the Debtors' real estate and related assets in the case styled *ACRES Capital, LLC v. The Bay Club of Naples, LLC, et al.*, in the Circuit Court of the Twentieth Judicial Circuit, in and for Collier County, Florida, Case No. 18-CA-3571 (the "Litigation").

4. In connection with the Litigation, the parties entered into a comprehensive settlement agreement (the "Settlement Agreement"). A copy of the Settlement Agreement, without exhibits, is attached as Exhibit 1. A copy of the First Amendment to Settlement Agreement is attached as Exhibit 2.

5. Among other things, the Settlement Agreement provides that (a) Soneet Kapila would serve in the dual roles of receiver for the Debtors' assets and sole manager/CRO of Debtors, and (b) Pinnacle Asset Trust (as owner of the Debtors) would make no changes to its organizational documents absent an Order of the foreclosure court or agreement of ACRES. Specifically, the Settlement Agreement provides that:

Borrower shall be manager controlled and that each Borrower shall appoint Kapila as the sole manager with exclusive control over the Borrowers in lieu of Pinnacle Asset Trust LLC *until the Receiver is*

¹ ACRES adopts, as if more completely set forth herein, the Motion to Dismiss [ECF No. 22] (the "First Motion to Dismiss") filed in 9:19-bk-10116-FMD. ACRES will therefore omit some of the history set forth in the First Motion to Dismiss not relevant to this Motion. Terms not otherwise defined herein shall have the same meaning as set forth in the First Motion to Dismiss.

discharged by order of the Court in the Litigation or the parties agree otherwise. The operating agreement of Pinnacle Asset Trust LLC shall be amended to provide that Pinnacle Asset Trust LLC, as the sole member of each Borrower, shall not make any changes in respect of the appointment of Kapila as the sole manager of each Borrower absent either an Order of the Court in the Litigation or written consent of ACRES and Kapila.

See Settlement Agreement, at p. 6, paragraph 10 (emphasis supplied).

6. The Settlement Agreement provided for the relevant operating agreements and organizational documents of all entities within the Debtors' ownership structure to adopt the foregoing provisions so that Mr. Zea would be completely removed from the Debtors' operations.²

7. On June 13, 2019, the state court presiding over the Litigation entered Orders approving the settlement agreement (the "Settlement Order") and appointing Mr. Kapila as receiver (the "Receiver Order"). A copy of the Settlement Order is attached hereto as Exhibit 3. A copy of the Receiver Order is attached hereto as Exhibit 4. There are no pending timely appeals from, or motions to reconsider, amend, or modify the Settlement Order or the Receiver Order.

8. The Settlement Order reserved jurisdiction in the state court presiding over the Litigation to enforce the terms of the Settlement Agreement. *See Settlement Order at paragraph 4.*

9. Upon entry, the parties immediately implemented the terms of the Settlement Agreement, Settlement Order, and Receiver Order.

10. Thereafter, on July 26, 2019, three purported creditors of the Debtors commenced an involuntary chapter 7 bankruptcy case in this Court, assigned case numbers 9:19-07035-FMD and 9:19-07038-FMD. Ultimately, on December 10, 2019, the Court dismissed the involuntary petition. *See ECF No. 107 entered in 9:19-07035-FMD.*

² Removing Mr. Zea from control of the Debtors was critically important consideration to ACRES in reaching the terms of the Settlement Agreement. The reason: there is over \$1 million in construction loan funds that are unaccounted for.

11. Separately, on October 24, 2019 (while the disputed involuntary petition was being litigated), Harry Zea filed voluntary chapter 11 petitions for the Debtors commencing chapter 11 cases assigned case numbers 9:19-bk-10116-FMD/9:19-10117 (together, the “First Voluntary Case”).

12. On November 12, 2019, ACRES filed its First Motion to Dismiss [ECF No. 22 in 9:19-bk-10116-FMD] based, in part, on Mr. Zea’s lack of authority over the Debtors under the Settlement Agreement, Settlement Order, and Receiver Order.

13. Rather than litigate the ACERS’ First Motion to Dismiss, Mr. Zea sought [ECF No. 51 in 9:19-bk-10116-FMD] the voluntary dismissal of the First Voluntary Case arguing that dismissal will “... allow the Debtors to determine who has the rightful authority to manage the Debtors’ affairs ...” *Id.* at para. 8. Further, Mr. Zea acknowledged that the authority over control of the Debtors cannot be addressed by this Court since the issue has already been addressed by the state court in the Litigation. *Id.* at para. 10.

14. On December 20, 2019, the Court granted the First Motion to Dismiss and entered an Order [ECF No. 62 in 9:19-bk-10116-FMD] (the “Dismissal Order”) dismissing the First Voluntary Case determining that: “[i]n issuing this Order, the Court is not opining as to whether the Debtors had authority to commence these Chapter 11 cases, which is reserved for the State Court to determine in the [Litigation].” *See* Dismissal Order.

15. The Dismissal Order is a final order of the Court entered in the First Voluntary Case. The prior Dismissal Order and ruling by the state court presiding over the Litigation raises additional estoppel issues to the re-litigation of these issues.³

³ This sequence of events raises all sorts of “estoppel by judgment” defenses that will need to be considered if the Court decides to exercise jurisdiction over the questions presented rather than send this matter back to state court where it belongs. The estoppel by judgment doctrines include: (1) the law of the case; (2)

16. Notwithstanding the Dismissal Order, neither Mr. Zea nor any other party obtained any determination from the state court presiding over the Litigation that Mr. Zea has authority to file bankruptcy on behalf of the Debtors.

17. Instead, Mr. Zea's attempt to undo the Settlement Agreement and Settlement Order was denied by the state court presiding over the Litigation at a hearing on February 25, 2020.

Debtor's Default and Entry of Final Judgment

18. After the First Voluntary Case was dismissed, the parties went back to the state court presiding over the Litigation, the Settlement Agreement, Settlement Order, and Receiver Order. Mr. Zea also sought to intervene in the Litigation seeking to have the state court modify the receivership order to relinquish authority to the Bay Club members to permit them to proceed with the voluntary bankruptcy cases. On May 5, 2020, the state court denied Mr. Zea's motion.

19. Debtors defaulted on the terms of the Settlement Agreement.

20. Thereafter, pursuant to the terms of the Settlement Agreement and Settlement Order, ACRES moved for entry of the stipulated final judgment (which was an exhibit to the Settlement Agreement). The stipulated final judgment was entered on January 29, 2020.

21. ACRES has continued to fund the receivership under the Receiver Order. Specifically, Mr. Kapila issued, and ACRES funded, receiver certificates secured by the Debtors' assets in the approximate aggregate amount of \$1,176,987.12, in order to pay the ongoing costs of preserving the Debtors' property and funding of \$857,057.16 in professional fees to Mr. Kapila and his counsel to date.

judicial estoppel; (3) equitable estoppel; (4) collateral estoppel or issue preclusion; and (5) res judicata or claim preclusion.

22. On April 7, 2020, the state court presiding over the Litigation and Settlement Agreement held a hearing on ACRES motion for summary final judgment of foreclosure in order to foreclose the interests of the junior lienors in Counts I and II and to update the calculations owed by the borrowers.

23. On April 7, 2020, the state court entered its Final Judgment of Foreclosure in the Litigation, a copy of which is attached hereto as Exhibit 5 (the “Final Judgment”). With attorney’s fees, costs, post-judgment interest, and additional receivership costs, the total due ACRES as of the date hereof exceeds \$30 million.⁴

24. Thereafter, on May 31, 2020, the state court presiding over the Litigation and Settlement Agreement entered an Amended Final Judgment of Foreclosure, for the limited purpose of clarifying that paragraph 13 which reserved jurisdiction to award attorneys’ fees did not include the guarantors. No changes were made in the April 7, 2020 Final Judgment of Foreclosure as to the Bay Club entities.

25. All of the foregoing events were carefully bargained for and set forth in the Settlement Agreement. The state court presiding over the Litigation entered the Settlement Order on notice to all parties. None of what transpired after the Court dismissed the First Voluntary Case was a surprise to anyone.

⁴ The amount due ACRES under the Final Judgment exceeds even Mr. Zea’s prior testimony concerning market value of the Debtors’ assets. Mr. Zea valued the assets at \$30 million in the First Voluntary Case. See ECF Nos. 38/29 in the First Voluntary Case. ACRES believes that the current market value of the assets is approximately \$15 million. Needless to say, to the extent the plan for these cases is to enter into a DIP loan to complete the construction, with the DIP lender priming the \$30 million first priority lien and claim of ACRES under 11 U.S.C. § 364(d) (which, ironically, was the very posture of the case that led to the entry of the Settlement Agreement in the first place), that will be vigorously opposed by ACRES.

26. Notwithstanding the foregoing, on June 29, 2020, ACRES received a series of unexpected pleadings from the Receiver, counsel to the Receiver, and Mr. Zea, purportedly acting on behalf of the Debtor. The pleadings included the following:

- a. A Motion to Discharge the Receiver by Mr. Kapila;
- b. A Motion to Withdraw as counsel to the Debtor on behalf of Mr. Battista;
- c. A Notice of Appeal filed by Jon Polenberg of Becker Poliakoff on behalf of the Bay Club entities⁵; and
- d. The voluntary chapter 11 bankruptcy petition [ECF No. 1] commencing this case purportedly authorized by Mr. Zea as manager of the Debtor.

None of the foregoing pleadings were authorized or approved by the state court presiding over the Litigation, which is required by one or more of the Receiver Order, Settlement Order, and Settlement Agreement.

27. The foregoing pleadings were all filed (we presume, because the parties have failed and refuse to provide a copy to ACRES) in furtherance of a June 26, 2020 settlement agreement (the “Secret Agreement”) by and among (again, we presume) Pinnacle Asset Trust, Mr. Zea, Mr. Kapila, and his professionals.

28. What we do know about the Secret Agreement is gleaned from the Debtors’ petition [ECF No. 1]. Included in the petition is the Manager’s (Mr. Zea’s) *Unanimous Written Consent* which states as follows:

... the undersigned hereby adopts these Resolutions notwithstanding any term(s) or provision(s) (the “Other Provisions”) of any agreement(s) or understanding(s) to the contrary to which the [Debtor] is a party, whether written or verbal (“Other Agreements”), and to the extent there are any such Other Provisions or Other

⁵ ACRES asserts that the appeal is not timely as to any of the listed orders or judgments as it relates to Debtor.

*Agreements hereby directs that these Resolutions control, supersede and replace such Other Provisions, and any such Other Agreements are hereby modified to reflect the terms and provisions set forth in these Resolutions. Notwithstanding [the] foregoing, the undersigned have examined that certain settlement agreement dated June 26, 2020 and that certain settlement agreement dated May 17, 2019 and have determined that these Resolutions are consistent with both settlement agreements **because the current manager for [the Debtors] has resigned voluntarily without any influence from the Company, the Company's member Pinnacle Asset, or Pinnacle Asset's members ...***"

See ECF No. 1, at page 14 of 34 (emphasis supplied).⁶

29. Regardless, there has been no order entered in the Litigation that permits these parties to enter into a private agreement that serves to alter, amend, or otherwise change the Settlement Agreement, Settlement Order, and Receiver Order.

30. Accordingly, the Court is presented with no facts or circumstances sufficient to disregard or otherwise abrogate the final ruling contained in the Dismissal Order; to wit: that the state court presiding over the Litigation reserved for itself to determine whether the Debtors have authority to commence these proceeding. No such determination has been made by the state court. The Court should again defer to the state court with jurisdiction over the parties to address Mr. Zea's respective authority over the Debtors. There is more than ample opportunity to do so in light of the foreclosure moratorium in the State of Florida that was recently extended through August 1, 2020. As a result of the moratorium, the earliest foreclosure sale date would be approximately September 1, 2020.

⁶ To the extent that this Court reverses course from its ruling in the Dismissal Order, and decides to undertake a determination of Mr. Zea's authority to file these cases, then ACRES will require substantial discovery from Mr. Zea, Mr. Kapila and his professionals on a number of different issues including the Secret Agreement and the curious statement that it was entered without any influence from any party. If that were a true statement, why was ACRES and more importantly, the state court presiding over the Litigation, not involved in approving an agreement that supercedes and overrides the Settlement Agreement, Settlement Order, and Receiver Order.

Argument

A. The Petition should be Dismissed for lack of Corporate Authority

31. The voluntary chapter 11 petition filed in this case should be dismissed because the petition was filed without corporate authority and in violation of the Settlement Agreement, Settlement Order, and Receiver Order.

32. An entity commences a voluntary bankruptcy case by filing a petition with the Court. *See* 11 U.S.C. § 301. However, the Court must turn to state law, not bankruptcy law, to determine whether the party signing the entity petition had authority to do so. *In re American International Industries, Inc.*, 10 B.R. 695 (Bankr. S.D. Fla. 1981) (bankruptcy court should look to the law of the state of incorporation to determine whether the entity initiating voluntary bankruptcy proceedings had authority to sign the petition); *In re A-Z Electronics, LLC*, 350 B.R. 886 (Bankr. D. Idaho 2006)(court looked to Idaho law, not bankruptcy law, to determine that the party signing the LLC's bankruptcy petition lacked authority to do so).

33. Limited liability companies are legal entities created by and under state law, blending attributes of corporations and partnerships. *Id.* at 890. Therefore, similar to partnerships and corporations, the requirements for filing a LLC bankruptcy will be based on state law, the company's organizational documents, and the company's operating agreements. *In re Avalon Hotel Partners, LLC*, 302 B.R. 377, 380 (Bankr. D. Or. 2003); *also see In re Yorkshire, LLC*, 393 B.R. 143, 148 (Bankr. S.D. Tex. 2006) (authority to file bankruptcy petition on behalf of LLC had to be determined from the state law governance documents of the entity).

34. As noted above, the Settlement Agreement provides that:

Borrower shall be manager controlled and that each Borrower shall appoint Kapila as the sole manager with exclusive control over the Borrowers in lieu of Pinnacle Asset Trust LLC *until the Receiver is*

discharged by order of the Court in the Litigation or the parties agree otherwise. The operating agreement of Pinnacle Asset Trust LLC shall be amended to provide that Pinnacle Asset Trust LLC, as the sole member of each Borrower, shall not make any changes in respect of the appointment of Kapila as the sole manager of each Borrower absent either an Order of the Court in the Litigation or written consent of ACRES and Kapila.

See Settlement Agreement, at p. 6, paragraph 10 (emphasis supplied).

35. Consistent with the Settlement Agreement, the Debtor's governance documents were revised to: (i) make Debtor a manager managed entity; (ii) appoint Mr. Kapila as manager with "full and complete authority, power, and discretion to manage and control the business, affairs, and properties" of the company; and (iii) clarify that the members of Debtor "shall have *no right, power or authority to manage the affairs of*" the company. *See Operating Amendments, Exhibit 6 (emphasis supplied).*

36. Yet, here, the voluntary bankruptcy petition [ECF No. 1] was not signed by Mr. Kapila who had the authority to file for bankruptcy for the Debtors as set forth in the Receiver Order. Instead, the petitions were signed by Mr. Zea as the manager of the Debtors. The corporate resolution accompanying the petition [ECF No. 1] acknowledges the prior Settlement Agreement but asserts the unilateral right to change it notwithstanding the pending Litigation where the Settlement Agreement was approved by the Settlement Order that retained jurisdiction to enforce its terms. The corporate resolution also references the Secret Agreement that was not approved by the state court presiding over the Litigation and suggests, curiously, that the Secret Agreement was not a product of duress or influence by Mr. Zea and others (which would be a separate violation of the Receiver Order).

37. The Settlement Order and Receiver Order were agreed orders entered in furtherance of the Settlement Agreement between the parties and constitute final orders in the Litigation. This

Court is bound to relinquish jurisdiction over litigation concerning these orders in furtherance of the parties agreement based upon the *Rooker-Feldman* doctrine, which limits the subject matter jurisdiction of federal courts over certain matters related to previous state court litigation. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923); *Dist. of Columbia Court of Appeals v. Feldman*, 450 U.S. 462, 476-82 (1983).⁷

38. As a result, there is nothing new here other than more issues to ferret out in the Litigation about the Secret Agreement and whether it can supersede, modify, or control the parties notwithstanding the Settlement Agreement, Settlement Order, and Receiver Order. Those matters should not be litigated in this Court. Therefore, like the Court ordered in its Dismissal Order entered in the First Voluntary Case, these cases must also be dismissed.

B. The Petition Should Be Dismissed as a Bad Faith Filing

39. Alternatively, and additionally, the petitions [ECF No. 1] filed by Mr. Zea should be dismissed as a bad faith filing, since the Debtors have basically one asset (the Property), have relatively few creditors (as demonstrated at the evidentiary hearing on October 25, 2019 in the involuntary cases), and the bankruptcy was improperly filed solely as an effort to frustrate ACRES' foreclosure of the Property.

40. Under 11 U.S.C. § 1112(b), a Chapter 11 bankruptcy case may be dismissed “for cause.” Although “cause” is not expressly defined, the lack of good faith in filing the petition constitutes “cause” for dismissal. *See, e.g., In re State Street Houses, Inc.*, 345 F.3d 1345 (11th Cir. 2004). In determining good faith, the court may consider any evidence of “an intent to abuse

⁷ There are a myriad of estoppel and related defenses that ACRES would present to the state court in the event that Mr. Zea or any other party (including Mr. Kapila) moves to modify or amend the Settlement Agreement, Settlement Order, the Receiver Order or any documents entered in furtherance thereof. Consideration of those defenses, however, should be left to the state court presiding over the Litigation.

the judicial process and the purposes of the reorganization provisions’ or, in particular, factors which evidence that the petition was filed ‘to delay or frustrate the legitimate efforts of secured creditors to enforce their rights.’” *In re Phoenix Piccadilly, Ltd.*, 849 F.2d 1393, 1394 (11th Cir. 1988), citing *In re Albany Partners, Ltd.*, 749 F.2d 670, 674 (11th Cir. 1984).

41. In *Phoenix Piccadilly*, the Eleventh Circuit identified a number of non-exclusive factors the courts may evaluate in determining whether cause exists to dismiss a bankruptcy case for lack of good faith. In *State Street*, the Eleventh Circuit reconfirmed that the *Phoenix Piccadilly* factors continue to be relevant to determining whether a Chapter 11 case was not filed in good faith and accordingly should be dismissed. These factors include:

- (1) whether the debtor has only one asset, the property at issue;
- (2) whether the debtor has a few unsecured creditors, whose claims are relatively small compared to claims of secured creditors;
- (3) whether the debtor has a few employees;
- (4) whether the property is subject to foreclosure action as a result of arrearages on debt;
- (5) whether the debtor’s financial problems essentially are a dispute between debtor and secured creditors which can be resolved in pending state court action; and
- (6) the timing of debtor’s filing and whether it evidences intent to delay or frustrate legitimate efforts of debtor’s secured creditors to enforce their rights.

See also In re Moog, 159 B.R. 357 (Bankr. S.D. Fla. 1993) (court considered timing of bankruptcy filing in determining whether filing was done with primary, if not exclusive, purpose of frustrating legitimate processes of non-bankruptcy litigation).

42. The totality of the record of these cases (including those previously dismissed which are subject of judicial notice) unequivocally satisfy all of the *Phoenix Picadilly* factors.⁸

43. Moreover, the timing of the filing, after the state court's entry of Final Judgment, and Mr. Kapila's mysterious resignation "without undue duress" and without authority of the state court, is further evidence of the Mr. Zea's efforts to further frustrate ACRES' legitimate efforts to enforce its rights under the applicable loan documents, Settlement Agreement, Settlement Order, Receiver Order, and Final Judgment. In evaluating bad faith, this Court should also take judicial notice under Fed. R. Evid. 201 of the involuntary case (dismissed for bad faith) and the First Voluntary Case (dismissed for state court to determine authority).

44. Simply stated, this case is textbook bad faith, according to *Phoenix Picadilly*, and accordingly should be dismissed under 11 U.S.C. § 1112(b).

C. Alternatively, the Court Should Abstain

45. Finally, and again in the alternative, the Court should dismiss this case based upon abstention.

46. The district court, pursuant to 28 U.S.C. § 1334, has exclusive jurisdiction over every case commenced under the Bankruptcy Code. In turn, that jurisdiction is referred to the bankruptcy courts pursuant to 28 U.S.C. § 157 and each district's standing order of reference.

47. However, a bankruptcy court need not exercise its exclusive jurisdiction over every case commenced under the Bankruptcy Code. Indeed, section 305 of the Bankruptcy Code explicitly provides for a mechanism to abstain from exercising jurisdiction in cases commenced under the Bankruptcy Code. It states, in pertinent part:

⁸ It is beyond serious debate that this case involves a single real estate project with no employees. It is also beyond question that the project is in foreclosure with a substantial arrearage due ACRES and the financial dispute is between the equity interests in Debtor and ACRES.

Section 305. Abstention.

(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if-

(1) the interests of creditors and the debtor would be better served by such dismissal or suspension;

11 U.S.C. § 305(a)(1).

48. Generally, when courts examine whether dismissal is appropriate under section 305(a)(1), they consider the following factors:

- 1) the economy and efficiency of administration;
- 2) whether another forum is available to protect the interests of both parties or there is already a pending proceeding in state court;
- 3) whether federal proceedings are necessary to reach a just and equitable solution;
- 4) whether there is an alternative means of achieving an equitable distribution of assets;
- 5) whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case;
- 6) whether a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time consuming to start afresh with the federal bankruptcy process; and
- 7) the purpose for which bankruptcy jurisdiction is sought.

See In re Marciano, 446 B.R. 407, 433 (Bankr. C.D. Cal. 2010) (citing *In re Monitor Single Lift I, Ltd.*, 381 B.R. 455, 464-65 (Bankr. S.D.N.Y. 2008)); *see also In re C & C Development Group, LLC*, Case No. 11-32362-BKC-AJC, 2012 WL 1865422 (Bankr. S.D. Fla. May 22, 2012) (Cristol, J.) (abstaining from exercising jurisdiction over bankruptcy case).

49. Applying the foregoing factors to the circumstances here proves that both the Debtors' and their creditors' interests would be best served by this Court's abstention under the circumstances.

50. The state court presiding over the Litigation, with the agreement of the Debtors, their owners, Mr. Zea, and ACRES, wrapped in long since final Settlement Order and Receiver Order already has custody of the Debtors' assets in the hands of a fiduciary (hand-picked by the parties), and has been supervising their operation since the Fall of 2018. While the current fiduciary apparently wishes to withdrawal, ACRES is prepared to replace him, as contemplated by the Settlement Agreement, with a competent fiduciary or one appointed by the state court. The state court forum will oversee (again, pursuant to the Settlement Agreement between the parties) the distribution of those assets pursuant to the Settlement Agreement, Settlement Order, Receiver Order and Final Judgment. This entire case is about Mr. Zea's latest futile attempt to revisit the Settlement Agreement (and actions flowing therefrom) that he reached in the Litigation. That purpose, as described above, is improper. For that separate reason, the Court should dismiss this case based upon abstention set forth in 11 U.S.C. § 305.

Conclusion

For all of the foregoing reasons, the Court should dismiss these bankruptcy cases and grant such additional relief as is justified by the circumstances presented.

Dated: July 1, 2020.

Respectfully submitted,

**STEARNS WEAVER MILLER
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CERTIFICATE OF SERVICE

I CERTIFY that the foregoing document is being filed electronically via the Court's CM/ECF website on July 1, 2020. I further certify that the documents is being served (a) by transmission of Notices of Electronic Filing ("NEF") generated by CM/ECF to those counsel or parties who are registered to receive NEF in this case; and (b) by first class mail, postage prepaid to those counsel or parties who are not registered to receive NEF in this case.

/s/ Drew M. Dillworth
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